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Notification of misconduct in Western Australia

A joint information resource prepared by the Public Sector Commission and the Corruption and Crime Commission on misconduct as defined by the *Corruption, Crime and Misconduct Act 2003*

1 July 2015

Commissioners' foreword



A handwritten signature in blue ink, appearing to read 'Mal Wauchope', written in a cursive style.

Public Sector Commissioner
Mal Wauchope

1 July 2015 marks the beginning of a new era in the regulation of corruption, crime and misconduct management in Western Australia. Changes to the *Corruption, Crime and Misconduct Act 2003* (CCM Act) mean that the Corruption and Crime Commission (CCC) and Public Sector Commission (PSC) will be working in partnership to ensure that misconduct in public authorities is managed more effectively and efficiently.

The effectiveness of arrangements managed across our two agencies will be enhanced as the PSC extends the reach of support services currently provided to public sector bodies in developing codes of conduct and ethical workplaces to local governments, public universities and government trading enterprises. The effectiveness of the CCC will be enhanced as it can concentrate its investigative effort and resources to addressing the most serious end of the misconduct spectrum and systemic crime and corruption risks in public authorities.

To facilitate this change, the legislation now separates serious and minor misconduct and provides different, but complementary, roles for the CCC and for the PSC. In practice, this means that principal officers (primarily CEOs of public authorities) will have to make an informed decision about whether a matter should be considered as misconduct under the CCM Act and, where a matter does meet that threshold, whether it should be treated as a serious or minor matter and reported to the CCC or to the PSC respectively.

The framework for misconduct provided in the CCM Act, acknowledges that most public authorities are capable of addressing and resolving most misconduct issues quickly and appropriately without immediate recourse to either the PSC or the CCC.

This advice aims to provide principal officers with summary information about the requirement to notify and about 'tests' to be applied in making an informed judgment about whether a matter should be treated as suspected minor or serious misconduct.

In preparing this advice and establishing arrangements between our agencies, we have endeavored to make the process as simple as possible while addressing the legislative requirements of the CCM Act.

The following guiding principles should also be considered when making notifying decisions:

- Public authorities should feel confident to make informed decisions based on relevant facts and circumstances. Notifications or reports made carefully and in good faith will be accepted on that basis.
- Do not notify both agencies as this will cause unnecessary duplication and effort. If either the PSC or the CCC assesses the matter differently to the public authority, we will use referral powers in the legislation to direct the matter appropriately and advise the principal officer of the reasons for that referral.
- In many circumstances, internal actions (such as a disciplinary process) can commence or continue as soon as the matter has been notified.

If after considering all of this, the decision is still unclear, we encourage principal officers to seek further assistance from the CCC or the PSC. More information products are available through our respective websites. We would also encourage principal officers to consider using their networks to assist each other in making sound decisions, acknowledging that they have diverse experience and expertise that can be shared.

We commend this advice to you as a foundation tool in the management of misconduct within Western Australian public authorities.



A handwritten signature in black ink that reads "John McKechnie". The signature is written in a cursive, flowing style.

Corruption and Crime Commissioner
Hon. John McKechnie, QC

Duty to notify

Role of principal officers

Principal officers are required by the CCM Act to notify the CCC or the PSC in writing of any matter that they suspect, on reasonable grounds, concerns either serious or minor misconduct.

This duty to notify is paramount and is to occur as soon as reasonably practicable after the principal officer becomes aware of the misconduct matter. The requirement to notify applies to all State Government departments, organisations and statutory authorities, local government, public sector boards and committees, public universities and government trading enterprises.

The CCC has issued Guidelines pursuant to s.30 of the CCM Act, which enables principal officers to report certain types of serious misconduct periodically, rather than notifying immediately. Principal officers should familiarise themselves with the CCC *Guidelines for Notification of Serious Misconduct*.

Misconduct by a public officer

Misconduct under the CCM Act can only be committed by a public officer, which is generally anyone using public resources to carry out a public function under a written law. The table below illustrates the differences in jurisdictions between PSC and the CCC, including the different roles in misconduct prevention and education and capability development under the CCM Act. If in doubt contact the CCC or the PSC to discuss the details of the CCM Act.

	CCC's jurisdiction	PSC's jurisdiction
Police misconduct	<ul style="list-style-type: none"> Any misconduct by a member of the Police Force, employee of the Police Department or a person seconded to perform functions, services or duties for the Police Department Reviewable police actions 	
Serious misconduct	<ul style="list-style-type: none"> Employees of public sector departments, organisations and statutory authorities, local governments, public universities and government trading enterprises Chairpersons and members of many public sector boards and committees Western Australian members of Parliament, and Parliamentary clerks Members of the Western Australian judiciary (in limited circumstances) Local government councils (including Mayors and elected members) 	
Minor misconduct		<ul style="list-style-type: none"> Employees of public sector departments, organisations and statutory authorities, local governments, public universities and government trading enterprises Chairpersons and members of many public sector boards and committees <p>But not:</p> <ul style="list-style-type: none"> Police (see police misconduct above left) Elected members in State or Local Government A Clerk of a house of Parliament
Prevention and education role	<ul style="list-style-type: none"> Misconduct prevention and education role for Police Discretionary capability development function in responding to serious misconduct matters (in cooperation with PSC) 	<ul style="list-style-type: none"> The misconduct prevention and education role encompasses serious and minor misconduct. PSC to be supported by the CCC, other independent agencies and appropriate authorities, in undertaking the prevention and education functions

Characteristics of misconduct

Serious misconduct

Serious misconduct, as defined in the CCM Act, turns to some extent, on the application of the term 'corruptly' but also includes any offence that is punishable by two or more years imprisonment.

Serious misconduct is when a public officer:

- acts corruptly or corruptly fails to act in the course of their duties; OR
- corruptly takes advantage of their position for the benefit or detriment of any person; OR
- commits an offence which carries a penalty of two or more years imprisonment.

Specific categories of serious misconduct and a schedule of offences are provided for in the notification guidelines issued by the CCC under s.30(1) of the CCM Act.

The main difference between serious and minor misconduct is that serious misconduct must involve corrupt intent and/or criminal conduct. The following are some considerations that can be taken into account in making the determination on whether the misconduct is serious or minor:

- The 'significance' or 'gravity' of the matter; what is the impact of the action or behaviour on the public authority, on the community's trust in the public authority, the financial position of the State or the advantage gained by the offending individual?
- Whether the nature and circumstances of the misconduct suggests a deliberate intention to act corruptly. This could involve determining if the conduct was on the one hand, naïve, ill-informed or careless or on the other negligent or wilful, planned and deliberate.
- Whether the conduct may amount to a criminal offence which carries a penalty of two or more years imprisonment.
- Whether the nature of the misconduct is largely 'disciplinary' or 'administrative' in character, and therefore potentially minor misconduct, rather than serious.

Corrupt conduct tends to show a deliberate intent or an improper purpose and motivation and may involve conduct such as the deliberate failure to perform the functions of office properly; the exercise of a power or duty for an improper purpose; or dishonesty.

Some examples include:

- Abuse of public office
- Blackmail
- Bribery, including bribery in relation to an election
- Deliberately releasing confidential information
- Extortion
- Obtaining or offering a secret commission
- Fraud or Stealing
- Forgery
- Perverting the course of justice
- An offence relating to an electoral donation
- Loss of revenue of the State by Tax evasion

Minor misconduct

Minor misconduct, as defined in the CCM Act, is actually not that minor. To meet the test under the CCM Act definition, the misconduct should be so significant that, if proved, it could reasonably lead to termination of a public officer's employment.

Minor misconduct occurs if a public officer engages in conduct that:

- adversely affects the honest or impartial performance of the functions of a public authority or public officer, whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;
- involves the performance of functions in a manner that is not honest or impartial;
- involves a breach of the trust placed in the public officer; or
- involves the misuse of information or material that is in connection with their functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person;

and

- constitutes, or could constitute, a disciplinary offence providing reasonable grounds for termination of a person's office or employment.

What is not misconduct?

Matters that are outside of the definitions of either serious or minor misconduct are not to be notified to the CCC or the PSC.

Other matters of general low-level discipline, misbehaviour or employee relations issues are to be managed by individual employing authorities and are outside the definition of misconduct under the CCM Act.

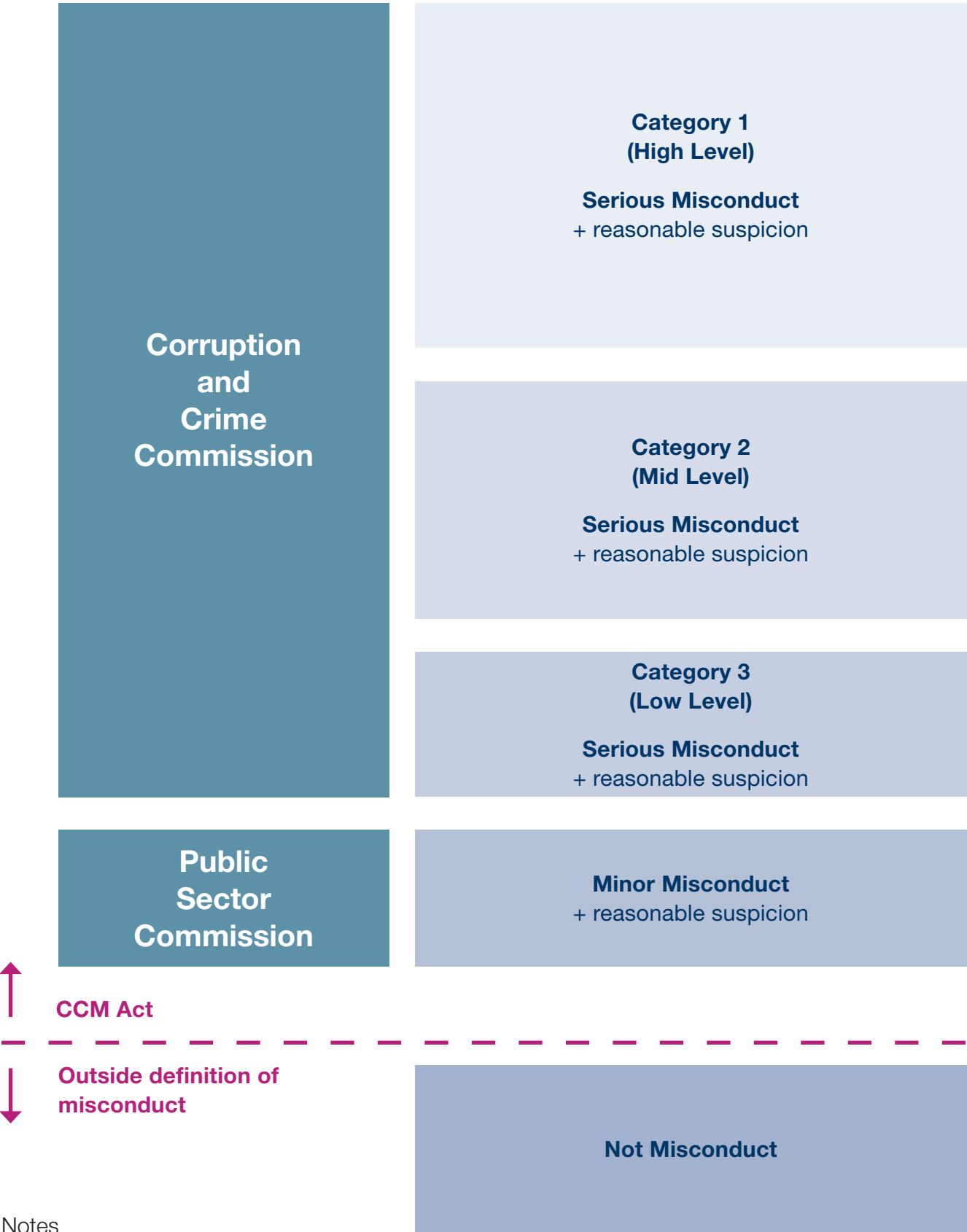
Examples could include general human resources and performance management issues, grievances around employee relationships, and minor infractions of policies and procedures.

However, records of such matters should be retained for internal monitoring and for reporting to the PSC on an annual basis. Public authorities may also be subject to periodic capability assessments on their management arrangements for misconduct generally.

Important directions to notifiers

- Once a public authority has notified the PSC or the CCC of alleged misconduct, the authority's obligation to notify will have been met.
- Public authorities should feel confident to make informed decisions based on relevant facts and circumstances. Notifications or periodic reports, made carefully and in good faith will be accepted on that basis.
- Do not notify both agencies as this will cause unnecessary duplication and effort. If either the PSC or the CCC assesses the matter differently to the public authority, we will use referral powers in the legislation to direct the matter appropriately and advise the principal officer of reasons for that referral.
- Where a matter includes both serious and minor allegations that are directly related or cannot be separated, notify the CCC.
- Notify as soon as practicable after forming a reasonable suspicion of misconduct:
 - Establishing a 'reasonable suspicion' is important and some local preliminary enquiries may be necessary to make an appropriate notification decision.
 - For serious misconduct your obligations as a notifier may change, depending on the seriousness, as reflected in the categories of serious misconduct. Refer to the CCC *Guidelines for Notification of Serious Misconduct*.

Summary of misconduct notification categories and obligations



Notes

- Summary reporting on all matters managed by the public authority may be sought on a periodic basis by the PSC or the CCC as part of their broader oversight roles.
- This summary does not apply to any matters relating to WA Police.

under the *Corruption, Crime and Misconduct Act 2003*

- The public officer has decision making powers or is a MP or elected member; OR
- Conduct alleged involves conspiracy or attempts at concealment; OR
- Financial loss or benefit is significant; OR
- Impact of conduct threatens notifying authority, agency or government; OR
- Impact of conduct on any person could result in a miscarriage of justice or denies entitlements or rights or is a threat to public safety.

Notify CCC as soon as practicable
Provide notification with as many details as possible

- Conduct alleged does not include any of the indicators listed in Category 1; AND
- Impact of the conduct is confined to the authority or agency; OR
- Allegation(s) include multiple instances of serious misconduct relating to the same public officer or multiple public officers.

Notify CCC monthly
Provide notification with as many details as possible

- All other serious misconduct that does not meet the Category 1 or 2 characteristics.

Notify CCC after action taken
Maintain full records

- The conduct meets the characteristics of misconduct; AND
- Is significant enough to give grounds for termination of employment.

Notify PSC as soon as practicable

-
- The conduct does not meet the threshold of misconduct but may be a matter of discipline, misbehaviour, or an employee relations issue; OR
 - The authority can effectively manage the behaviour, grievance or complaint.

Notification not required under CCM Act

Making a misconduct notification

How to notify

Misconduct notifications should be made in writing and, where possible, electronically.

	Serious misconduct		Minor misconduct
Online	Using the online form at www.ccc.wa.gov.au	Online	Using the online form at www.publicsector.wa.gov.au
Email	info@ccc.wa.gov.au	Email	minormisconduct@psc.wa.gov.au
Post	PO Box 7667, Cloisters Square, St Georges Tce PERTH WA 6850	Post	Locked Bag 3002, WEST PERTH WA 6872

What to include in a notification

For specific information required by CCC or PSC in a notification, please refer to the online forms and guidelines.

Generally, principal officers should include the following information in the notification:

- How and when the principal officer became aware of the matter, name and contact details of the notifier
- Relevant details including the names, positions and contact details of the public officer/s who may be involved or who are aware of the matter
- A brief description of the alleged or suspected events and any dates, times and places in which the events occurred
- The approximate values of goods or amounts of money that maybe involved
- Any detriment, risk or danger to any persons or the public
- A brief analysis of why the events in question may be serious or minor misconduct
- Any evidence that supports the suspicion, including the details of witnesses, any documents, emails and other materials
- What action has been taken to date, and what further action is proposed

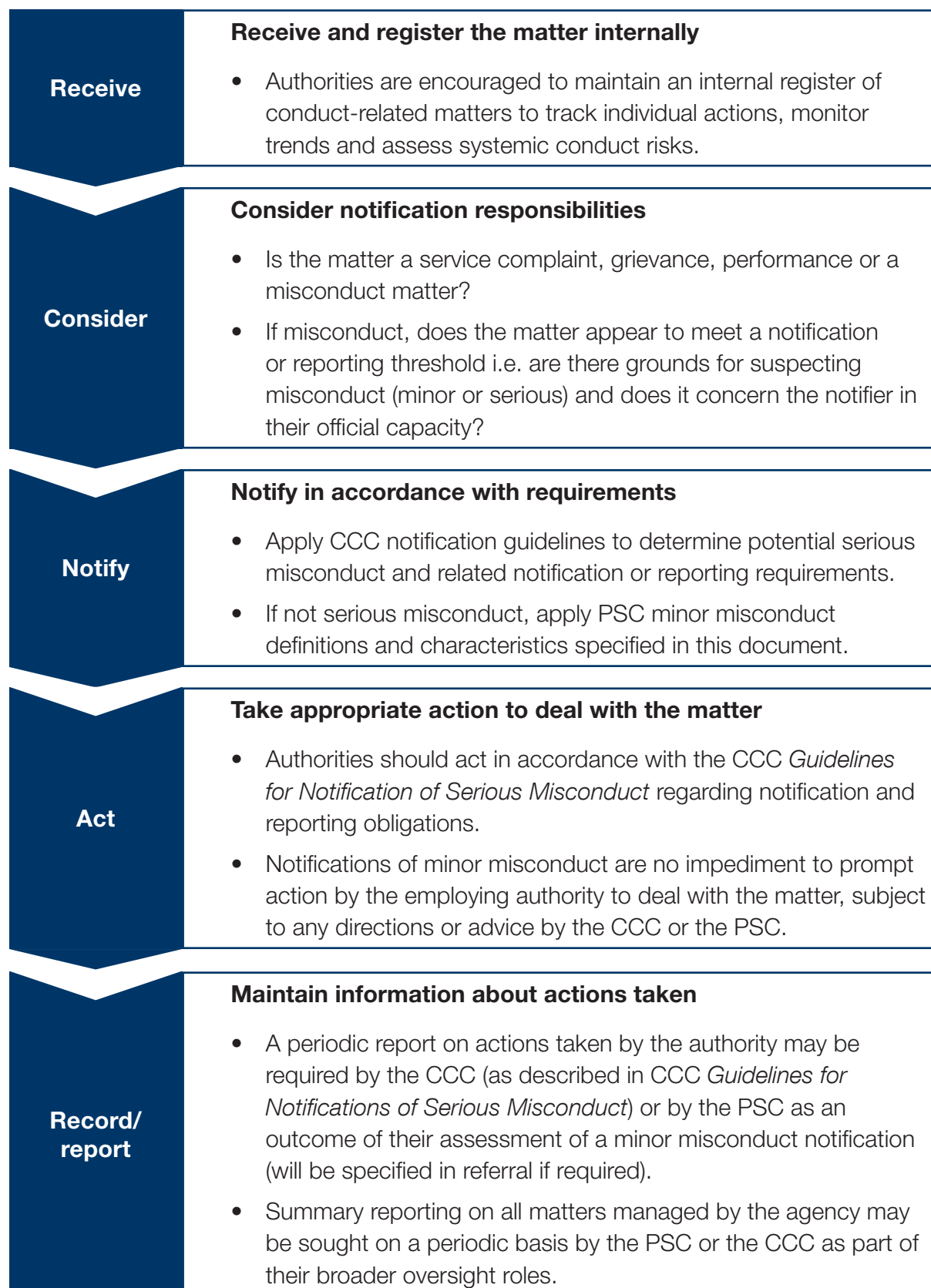
What happens next?

The CCC or the PSC will assess the misconduct matter and advise of any required action in due course. However, in many cases principal officers and employing authorities will not be prevented from commencing discipline or taking other remedial actions whilst awaiting direction from the CCC or from the PSC.

- Authorities should act in accordance with *CCC Guidelines for Notifications of Serious Misconduct* in managing the categories of serious misconduct.
- Notifications of misconduct are no impediment to prompt action by the employing authority to deal with the matter, subject to any directions or advice from the CCC or the PSC.

Making it work

The following diagram summarises the steps that public authorities should take in processing allegations of misconduct raised with or within the authority.



CCC

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PO Box 7667, Cloisters Square, Perth WA 6850
Telephone: (08) 9215 4888
1800 809 000 (Toll Free for callers outside the Perth metropolitan area)
Facsimile: (08) 9215 4884
Email: info@ccc.wa.gov.au
Website: www.ccc.wa.gov.au

PSC

Public Sector Commission
Dumas House, 2 Havelock Street, WEST PERTH WA 6005
Locked Bag 3002, WEST PERTH WA 6872
Telephone: (08) 6552 8888 Fax: (08) 6552 8501
Email: minormisconduct@psc.wa.gov.au
Website: www.publicsector.wa.gov.au

To gain a legal understanding of the process for notifying matters of misconduct, refer to the *Corruption, Crime and Misconduct Act 2003* available from State Law Publisher at www.slp.wa.gov.au

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